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IN THE :

Supreme Court of the United States

OCTOBER TERM, 1999

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. COLEMAN
KENNETH PHILIP ROSS
EUGENE J. SCHILTZ
SEAN B. CROTTY
ROBERT F. COLEMAN & ASSOCS.
5310 Three First National Plaza
Chicago, IL 60602
(312) 444-1000

KENNETH CHESEBRO*
1600 Massachusetts Avenue
Cambridge, MA 02138
(617) 661-4423

EUGENE I. PAVALON
GEOFFREY L. GIFFORD
PAVALON, GIFFORD, LAATSCH
& MARINO
Two North LaSalle Street
Suite 1600
Chicago, IL 60602
(312) 419-7400

Counsel for Petitioner

**Counsel of Record*

January 3, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

4/2 pp

QUESTION PRESENTED

Whether a sovereign State, as an unwilling civil litigant in federal court, may be denied Fed. R. Civ. P. 60(b) relief to which it is otherwise entitled, on the theory that its earlier efforts to litigate its own claims arising under its own law in its own courts give it "unclean hands" so that "equity" requires denying the relief.

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PETITION FOR A WRIT OF CERTIORARI

The Kansas Public Employees Retirement System, Inc. ("KPERS") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on October 5, 1999.

OPINIONS BELOW

The Eighth Circuit's decision (App. 1a-6a)[1] is reported at 194 F.3d 922. The decision of the district court denying KPERS' motion for Fed. R. Civ. P. 60(b) relief (App. 7a-11a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on October 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part as follows:

Rule 60. Relief from Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or

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[1] References to the Appendix to this Petition are styled "App. __a."

> discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *

STATEMENT OF THE CASE

This case is one of several cases that have been filed by the State of Kansas through KPERS, its agency responsible for investing the retirement funds of its public employees. These cases all arise out of the huge losses suffered by KPERS, allegedly due to fraud and other wrongdoing by respondents and various other defendants, in connection with KPERS' direct placement and other venture capital investments made in the 1980s.

Common to all these cases has been the question under Kansas law of whether KPERS must satisfy the general statute-of-limitations periods applicable to claims brought by private parties. As to all cases except this case, the Kansas Supreme Court announced the controlling answer in a decision handed down on June 27, 1997: general limitations periods do not apply because KPERS' investment function is "governmental" rather than "proprietary" in nature. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321,1328-43 (Kan. 1997). Under that ruling, all of KPERS' claims arising out of its losses from the venture capital investments it made in the 1980s are concededly timely.

Except, so far, the claims raised in *this* case. Unlike the other cases which have all been handled in Kansas state court, this case is in Missouri federal court as a result of respondents' manipulative forum-shopping efforts. In this case, the Eighth Circuit took up the threshold statute-of-limitations issue after the issue had been fully briefed and argued in the Kansas Supreme Court. Rather than waiting for that court's decision, as KPERS urged, the Eighth Circuit accelerated the oral argument and decision of this case, upheld dismissal of all claims as untimely, and immediately denied rehearing.

Due to the Eighth Circuit's accelerated oral argument, decision and denial of rehearing in the case, the dismissal of KPERS' claims

became final in the Eighth Circuit on June 20, 1997 — just seven days before the Kansas Supreme Court issued its non-accelerated ruling. That court unanimously held that all of KPERS' claims are timely as they all arise from governmental activity.

Thereafter, KPERS filed a motion under Fed. R. Civ. P. 60(b)(6) seeking to alter or amend the judgment to remove the statute-of-limitations dismissal. KPERS invoked a line of federal appellate cases authorizing Rule 60(b) relief upon a change in controlling state law where relief is needed to eliminate a disparity in the outcome of related cases, especially where that disparity is the result of the judgment loser having been deprived of its initial choice of a state-court forum that would have permitted an authoritative resolution of the issue, so that *Erie* principles cut in favor of relief in this narrow category of cases.

In its decision below addressing KPERS' Rule 60(b) motion, the Eighth Circuit assumed that KPERS had demonstrated circumstances generally warranting the Rule 60(b) relief it requested. But the Eighth Circuit rejected that relief based on KPERS' earlier efforts to keep this case out of federal court, or at least to obtain an authoritative statute-of-limitations ruling from the Kansas Supreme Court. It turns out that these efforts by KPERS to avoid any *need* for Rule 60(b) relief from an inconsistent outcome in related cases on an issue of state law have now been invoked as constituting a *bar* to such relief. To the Eighth Circuit, the efforts of an agency of the State of Kansas to have its claims arising under its own law decided in its own courts are to be viewed as giving it "unclean hands." The State of Kansas has thus been penalized for having asserted its sovereign interests. Whether Rule 60(b) and fundamental principles of federalism permit a denial of relief on such a theory is the issue presented here. The Eighth Circuit's decision conflicts with numerous decisions of this Court and of other circuits.

1. The Kansas State Trial Court's Statute-of-Limitations Ruling

This lawsuit was filed in Kansas state court on June 5, 1991, by the Kansas Attorney General, appearing on behalf of KPERS. KPERS is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It is part of a complex state statutory and administrative scheme created "for the purpose of effecting economy and efficiency in the administration of governmental affairs." K.S.A. § 74-4901. It is responsible for administering the pension funds of over 162,000 Kansas public employees through the State Treasurer's office. Pet. App., No. 97-471, at 32a.[2]

KPERS brought suit to recover $65 million, plus interest, that it lost as the result of alleged fraud and other misconduct in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association. *KPERS v. Blackwell, Sanders, Matheny Weary & Lombardi, L.C.*, 114 F.3d 679, 683-84 (8th Cir. 1997) ("*KPERS VI*"). Named in the suit (either originally or in amended pleadings filed on December 23, 1991) were various respondents, including the former directors of Home Savings, who allegedly had made fraudulent misrepresentations to KPERS to induce KPERS to make its investment; KPERS' former investment adviser; and KPERS' former accounting firm. Other respondents were named later. *Id.* at 681-82, 684-85.

On March 17, 1992, several respondents moved in the Kansas state trial court to dismiss KPERS' claims on statute-of-limitations grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the general statutes of limitations therefore applied to KPERS' claims,[3] and that all of

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[2] Various citations to unpublished district court decisions aside from the district court decision from which the instant appeal was taken, and citations to other materials from the record of the case, are to the appendices to previous petitions for certiorari filed by KPERS in this Court (identified by number), in which those materials were reprinted.

[3] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.* 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to

KPERS' claims were barred by the two-and three-year statutes of limitations for tort and statutory actions, respectively (K.S.A. §§ 60-512, 60-513). *KPERS v. Reimer & Koger Associates, Inc.* ("*KPERS IV*"), 77 F.3d 1063, 1065 (8th Cir.), *cert. denied*, 519 U.S. 948 (1996).

On August 21, 1992, the Kansas state trial court issued an exhaustive opinion rejecting respondents' motion. It concluded that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no general statute-of-limitations period applied to KPERS' claims against respondents, so that all of KPERS' claims were timely. *KPERS v. Reimer & Koger Associates, Inc.*, No. 91 CV 786 (Dist. Ct. Shawnee County, KS, 7th Div., Aug. 21, 1992), slip op. at 30-31.

2. The First Three Years of Delay Caused by the Removal of this Case to Missouri Federal Court, Leading to an Erroneous Limitations Ruling

Five years later, the Kansas Supreme Court would unanimously agree with the trial court's conclusion that no general statute-of-limitations period applies to KPERS' claims, as KPERS' investments were made in a governmental capacity. But it would do so on an interlocutory appeal in other related cases that had been brought by KPERS, not in this case.

In this case, respondents elected not to seek interlocutory review of the Kansas state trial court's rejection of their statute-of-limitations argument. Instead, through what can most charitably be described as the use of a creative combination of third-party practice and a special removal statute, respondents managed to shift this entire litigation concerning KPERS' investment in Home Savings from state court in Kansas to federal court in Missouri. Then, even after the reason justifying the removal had disappeared, they convinced the Missouri federal district judge to keep the case,

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circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

even though it could never have been filed in any federal court.[4]

Having thus threaded the eye of a jurisdictional needle, once in federal court respondents moved *again* to dismiss the litigation as untimely, on this occasion with greater success. Disagreeing with the Kansas state trial court's view of Kansas law even as he admitted not understanding the pertinent Kansas law, the federal district judge in 1994 held that KPERS' claims were proprietary in

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[4] On October 2, 1992, several respondents filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses; they also sought indemnification under 12 C.F.R. § 545.121. This pleading was ultimately dismissed as unmeritorious for failure to state a claim, see *KPERS v. Reimer & Koger Associates, Inc.*, No. 92-0922-CV-W-9 (W.D. Mo.), Order filed June 13, 1994, ¶¶ 5-7, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) to remove the entire case to the Western District of Missouri, where Home Savings had its principal place of business. Notice of Removal filed Oct. 13, 1992 (W.D. Mo.) (No. 92-0922-CV-W-9). Following the removal, KPERS promptly moved to remand the case on the grounds that the third-party claims asserted against the RTC had been properly severed from the lawsuit before the RTC removed the case and, in any event, that the third-party claims against the RTC were frivolous. The district court denied KPERS' motion, and the Eighth Circuit affirmed. *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994).

The RTC was then dismissed from the case on the ground that the third-party claims that had been brought against it were indeed meritless. At that juncture, KPERS again requested that the district court remand the case, citing the RTC's position that there was no reason for the case to remain in federal court. *See* Plaintiff's Supplemental Appendix, *KPERS v. Reimer & Koger Associates, Inc.*, 8th Cir. No. 95-3499, at 2 (statement of RTC's counsel that the RTC had removed the case only "[f]or the purpose of pursuing our motion to dismiss. Once that's accomplished, the [RTC's] motion [to dismiss the third-party complaint] is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court."). The district court nonetheless elected to retain supplemental jurisdiction over the case under 28 U.S.C. § 1367, a decision that was upheld on appeal. *See KPERS IV*, 77 F.3d at 1067-68 (affirming district court's refusal to remand). Several respondents entered this litigation thereafter by intervening as defendants in the federal lawsuit.

character, and hence were subject to the general statutes of limitations.[5] Respondents then filed an interlocutory appeal that resolved the specific limitations periods applicable under Kansas law on the premise that KPERS' investment function was proprietary in nature.[6]

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[5] *See* Hearing of Apr. 28, 1994, in *KPERS v. Reimer & Koger Associates, Inc.* No. 92-0922-CV-W-9 (W.D. Mo.), Tr. at 40. The district court judge noted that KPERS was not subject to the general statutes of limitations "unless the cause of action asserted by KPERS arose out of a proprietary function or activity of KPERS as opposed to a governmental function," *id.* at 20, and observed that the Kansas state-court judge handling the case, Judge Theis, had "already ruled" that KPERS' functions were governmental in nature. *Id.* at 26. The district judge noted that Judge Theis had offered an "apparently very well thought out analysis" in his lengthy written opinion of some 64 pages, although the district judge also admitted, quite "frankly," that he "had trouble understanding it." *Id.* at 35. After issuing an oral ruling that covered just one transcript page in reaching a contrary conclusion, *id.* at 40, the district judge observed: "Now, I think it's appropriate at this point to concede the difference between the decision I just rendered in its length and the decision of Judge Theis." *Id.* at 40-41. The 1994 decision of the district court below thus "contained no analysis," as the Kansas Supreme Court later noted in unanimously agreeing with the result reached by Judge Theis. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321,1338 (Kan. 1997).

[6] *See KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608, 615 (8th Cir. 1995) ("*KPERS III*") (holding that "the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statute to KPERS' claims if the claims would be 'fully barred' by these statutes"), *cert. denied*, 516 U.S. 1114 (1996). KPERS appeared only as appellee in this interlocutory appeal. Having won below (the district court had in the end ruled in favor of KPERS, finding that all of KPERS' claims against all respondents were timely under a special ten-year statute of limitations expressly applicable to KPERS), at that juncture KPERS did not seek review of the district court's ruling that KPERS' investment function was proprietary within the meaning of Kansas law. When it was later forced to litigate that issue in the Eighth Circuit, after that court refused to defer to the Kansas Supreme Court on the issue, KPERS lost. *See KPERS VI*, 114 F.3d at 687-88.

3. The Injunction Entered Against KPERS Barring It From Obtaining a Definitive Statute-of-Limitations Ruling from the Kansas State Courts

At this point, having endured three years of federal litigation triggered by respondents' efforts to see the case removed to federal court, and their insistence that the district court exercise supplemental jurisdiction even after the predicate for removal was gone, see note 4, *supra*, and desiring to obtain an authoritative statute-of-limitations ruling from the Kansas appellate judiciary, KPERS asked the district court to certify to the Kansas Supreme Court the critical threshold issue of whether the relevant investment activities by KPERS were governmental as opposed to proprietary in nature. This the district court declined to do so. *See* Dist. Ct. Docket Entries 677 (9/12/95) and 761 (10/24/95).

Lacking any other option in this case to obtain an authoritative ruling on this contested issue, KPERS then filed parallel lawsuits against respondents in Kansas state court for the explicit purpose of providing a vehicle for obtaining interlocutory review of these issues from the Kansas Supreme Court. *KPERS IV*, 77 F.3d at 1066-67 (crediting the statement of counsel for KPERS "that KPERS filed the cases in Kansas because of a 'multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations,'" and the district court's conclusion that KPERS filed these cases "'to attempt to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit'").

This avenue of relief was quickly blocked as well. Respondents filed motions in the Missouri federal court to enjoin KPERS from proceeding with these or any other state court actions against respondents related to the case pending in Missouri. *Id.* The district court immediately issued a TRO to prevent "KPERS from filing any further actions in the future" as a means "to avoid further disruptions of this case," finding that "[i]t undermines my ability to effectively manage this case to have claims asserted elsewhere." Pet. App., No. 96-113, at 17a. Over vigorous opposition from KPERS, *see id.* at 21a-35a, the district

court entered a preliminary injunction stating that in its view, the All Writs Act, 28 U.S.C. § 1651(a), authorized it "to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case," as "the first court in which jurisdiction attaches has priority to consider the case" given the desirability of avoiding "multiplicity of litigation." Pet. App., No. 96-113, at 26a-27a. The Eighth Circuit affirmed. *KPERS IV*, 77 F.3d at 1067-71.

Relegated to litigating the threshold statute-of-limitations issue in this case in federal court, KPERS then briefed and argued the issues. In rulings issued on June 3 and July 25, 1996, the district court held that all of KPERS' claims against all respondents in this case were untimely because they had not been filed within the general limitations periods afforded private parties on the legal claims involved. Pet. App., No. 96-113, at 27a-73a, 80a-96a.

4. KPERS' Efforts to Convince the Eighth Circuit to Simply Await Decision of the Earlier Docketed Kansas Supreme Court Appeal on the State-Law Issue

As the district court was issuing its rulings dismissing the claims involving Home Savings that KPERS had been forced to litigate in Missouri federal court, further efforts were under way in Kansas to obtain an authoritative determination, for the entire array of litigation involving KPERS' investment activities, of the applicable limitation period for KPERS' claims.

On April 3, 1996, the Kansas state trial court in charge of the remaining cases brought by KPERS (concerning losses on approximately a dozen other investments) rejected all of defendants' claims that the cases were untimely. Memorandum Opinion and Entry of Judgment, *KPERS v. Reimer & Koger Associates, Inc.*, No. 93 CV 588; *KPERS v. Russell*, No. 93 CV 389; *KPERS v. Ward*, No. 92 CV 433A; *KPERS v. Byrd*, No. 92 CV 923; and *KPERS v. Cohen, Brame & Smith*, No. 92 CV 805 (Dist. Ct. Shawnee County, KS, 7th Div., Apr. 3, 1996). Among other rulings, the trial court reaffirmed its earlier analysis that, under Kansas law, KPERS is not subject to the general statutes of limitations, because its investment functions are governmental in

nature, not proprietary. *Id.* at 4, 18.

Three of the defendants who were adversely affected by this ruling in the Kansas cases are also respondents in this case. They (along with other defendants) promptly took interlocutory appeals from the Kansas state trial court's ruling in five of the cases pending before it. In light of the importance of the issues, the Kansas Supreme Court *sua sponte* transferred the interlocutory appeals from the intermediate appellate court to its own docket. *KPERS v. Ward*, No. 96-76524-AS (Kan. May 28, 1996). The consolidated appeals were fully briefed by November 1, 1996. On March 5, 1997, the Kansas Supreme Court heard oral argument.

The briefing schedule for KPERS' appeal from the district court's statute-of-limitations dismissal of its Home Savings claims ran several months behind the Kansas Supreme Court schedule. On several occasions during KPERS' Eighth Circuit appeal, KPERS requested that it defer to the Kansas Supreme Court in light of the advanced status of its pending consideration of an outcome-determinative issue that the Eighth Circuit had never before considered (see note 6, *supra*): whether or not KPERS' claims are governmental in nature within the meaning of Kansas law, and hence are exempted from the general Kansas statutes of limitations.

On December 12, 1996, KPERS filed its opening brief in the Eighth Circuit. KPERS began its argument as follows:

> This appeal concerns issues of Kansas law of first impression that are now before the Kansas Supreme Court in a fully-briefed appeal to which the Reimer & Koger, Shook Hardy and Blackwell Sanders defendants are all party. This Court should certify those issues to the Kansas Supreme Court or refrain from ruling on them until that Court decides the pending appeal.

Brief of Appellant (No. 96-3680) at 25. KPERS summarized the efforts of the parties in the consolidated Kansas litigation, and of the Kansas Supreme Court, to obtain a prompt and authoritative resolution of these issues of first impression, and argued that principles of cooperative judicial federalism required the Eighth Circuit either to certify the issue to the Kansas Supreme Court or

to stay its hand pending that court's ruling. *Id.* at 27-29. In an abundance of caution, KPERS also reiterated the arguments made to the Kansas Supreme Court as to why it "is exempt from general periods of limitations under Kansas law because it is a governmental entity engaged in a governmental function." *Id.* at 25; *see also id.* at 29-42.

On January 27, 1997, KPERS filed its Eighth Circuit reply brief, in which it informed the court that the Kansas Supreme Court had already scheduled oral argument in the consolidated appeals for March 5, 1997. Reply Brief of Appellant at 1 n.1. KPERS again emphasized the wisdom of "deferring decision" on the appeal until that court resolved the "pending, fully briefed appeal," arguing that any other course " would be abhorrent to the principles of federalism." *Id.* at 1. Further, rebutting the suggestion of appellees (respondents in this Court) that the Eighth Circuit could safely move forward because the proprietary nature of KPERS' investment function was supposedly "settled in Kansas," *id.* at 2, KPERS pointed out that several appellees had conceded the contrary in the Kansas litigation. *See, e.g., id.* at 2.

The Eighth Circuit declined KPERS' request to defer consideration of the case. Instead, on February 24, 1997, after the Eighth Circuit's calendar of March 1997 arguments had already been distributed to counsel, the court amended its calendar and ordered that oral argument be held three weeks later, on March 13, 1997. *See* Letter of Debbie Heusohn, Asst. Calendar Coordinator, to All Counsel of Record, February 24, 1997. At the March 13 oral argument, KPERS reiterated its request that the Eighth Circuit defer to the impending decision of the Kansas Supreme Court on the controlling issue of Kansas law.

Just two months later, on May 13, 1997, the Eighth Circuit issued its decision in this case. In affirming the district court's decision that all of KPERS' claims are time-barred, the Eighth Circuit rejected out of hand KPERS' argument that its underlying investment function involved a governmental function, so that it is exempt from the general Kansas statutes of limitations. *KPERS VI*, 114 F.3d at 687-88. The Eighth Circuit opined that "clear holdings" of the Kansas Supreme Court "compel rejection of

KPERS' argument." *Id.* at 688. The court's opinion did not address KPERS' repeated requests that, at the very minimum, the Eighth Circuit should defer decision of the case until after the Kansas Supreme Court decided the consolidated appeals on whether KPERS is exempt from the general Kansas statutes of limitations. The Eighth Circuit did address KPERS' suggestion that various issues of Kansas law, including the applicability of the general statutes of limitations to its investment function, be certified to the Kansas Supreme Court. It declined that course, again without any reference to the consolidated appeals then pending in the Kansas Supreme Court. *Id.* at 688 n.11.

On May 23, 1997, KPERS filed a rehearing petition arguing that the Eighth Circuit had ignored vital principles of federalism by failing to defer decision on this key issue even though "the Kansas Supreme Court found the issues so significant that it *sua sponte* transferred the pending appeals from the Kansas Court of Appeals to its own docket." Plaintiff-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, filed May 23, 1997, at 4-5. KPERS urged the Eighth Circuit, at the very least, to hold the rehearing petition in abeyance pending the Kansas Supreme Court's decision so that it could readily conform its judgment to any contrary decision from the Kansas Supreme Court.[7]

In response, the Eighth Circuit declined even this means of deferring ultimate resolution of the case pending the Kansas Supreme Court's decision in the consolidated appeals. On June 12, 1997, less than three weeks after KPERS filed its rehearing petition, the Eighth Circuit denied the petition without explanation

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[7] KPERS observed: "Should the Kansas Supreme Court reach a different conclusion on issues of Kansas law from those reached in *KPERS III* and this case, this Court will be obligated to correct its decision to conform it to the decision of the Kansas Supreme Court, even after the time for rehearing has expired and during the pendency of a petition for writ of certiorari. It would be wasteful and inefficient to force KPERS to seek further review of decisions that might well be mooted by an authoritative decision in Kansas simply because this Court reached its decision on issues of Kansas law more quickly than the Kansas Supreme Court." Petition for Rehearing at 5-6 (citing *Huddleston v. Dwyer*, 322 U.S. 232 (1944)) (other citations omitted).

or comment. Its mandate issued on June 20, 1997.

5. The Kansas Supreme Court's Controlling Decision, and KPERS' Efforts to Obtain Conformance With It

One week later, on June 27, 1997, three and a half months after it held oral argument, the Kansas Supreme Court issued its unanimous decision in the consolidated appeals. It agreed with the trial court's ruling made in this very case in 1992 (before it was removed to Missouri federal court) that KPERS' underlying investment function is governmental in nature, not proprietary — so that the general statutes of limitations do not apply and the entire array of litigation involving KPERS' investment losses is timely under Kansas law. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1328-43 (Kan. 1997). Concluding that "the actions of KPERS involved in this litigation are all governmental in character," *id.* at 1343, the Kansas Supreme Court stated that the Eighth Circuit's contrary conclusion was premised on a fundamental misunderstanding of Kansas law: the Eighth Circuit had "failed to recognize the distinction between governmental immunity cases and those involving statutes of limitations. It also failed to recognize that there is a significant distinction between a suit by employees to recover contractual benefits and a suit by KPERS arising from its investment activities." *Id.* at 1341.

On July 16, 1997, KPERS filed a second petition for rehearing, alerting the Eighth Circuit to the Kansas Supreme Court's decision and arguing that the Eighth Circuit was required to conform its judgment to that decision for two independent reasons.[8] First, KPERS argued that such action was necessary in light of the Eighth Circuit's earlier refusal to stay its hand in deference to the consolidated appeals in the Kansas Supreme Court, as a remedy to cure its earlier error. Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing En Banc, filed July 16, 1997, at 6-8. Second, KPERS argued that under a line of authority

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[8] This second petition was accompanied by a motion for leave to file it out of time or, in the alternative, to recall the mandate for the purposes of conforming the Eighth Circuit's decision to the recent decision of the Kansas Supreme Court.

beginning with *Huddleston v. Dwyer*, 322 U.S. 232, 235-38 (1944), even if KPERS had never apprised the Eighth Circuit of the pending Kansas Supreme Court appeal or requested that it stay its hand, The Eighth Circuit was required to conform its judgment to *any* intervening, controlling decision on a question of state law, as long as the party brings a rehearing petition within the time for petitioning for certiorari. *Id.* at 8-9.

In its second petition for rehearing, KPERS specifically urged the Eighth Circuit to act promptly to bring its judgment into conformance with the Kansas Supreme Court's recent decision, so as to spare the parties and this Court the burden of a petition for certiorari. *Id.* at 9. KPERS reiterated that request in a letter to the Court filed after a month and a half passed without a decision. *See* Pet. App., No. 97-471, at 25a-26a. As KPERS' petition for certiorari was going to press, on September 9, 1997, counsel for KPERS were orally advised by the Clerk's office of the Eighth Circuit that the second petition for rehearing had been denied, without opinion.

KPERS' petition for certiorari (No. 97-471) asked this Court to grant review of whether the Eighth Circuit violated principles of cooperative judicial federalism in its refusal to defer to the Kansas Supreme Court's contemporaneous consideration of an unsettled state-law issue where the State itself was a party. The petition requested that the Court, at minimum, grant a "GVR" order directing the Eighth Circuit to give further consideration to the intervening Kansas Supreme Court decision. This latter request drew the support of three Members of this Court (O'Connor, Souter and Ginsburg, JJ.), as indicated in the Court's order denying certiorari entered on January 12, 1998. 522 U.S. 1068.

6. The Instant Motion for Rule 60(b) Relief

Two and half months after this Court's denial of certiorari, the Eighth Circuit decided another appeal in this case brought by KPERS from the district court's grant of summary judgment in favor of a final defendant in the case, Michael K. Russell. The Eighth Circuit ruled for KPERS in this appeal, *see KPERS v. Michael K. Russell*, 140 F.3d 748, 752 (8th Cir. 1998) ("*KPERS*

VII"). It did so by applying the Kansas Supreme Court decision that had come down seven days after the Eighth Circuit's mandate issued in *KPERS VII*, a decision which it concluded it was "obliged to follow." Pet. App. 4a. With the entry of this Eighth Circuit decision, it was clear that the accident of a week's timing had resulted in a radically different outcome for the co-defendants in the case, who had all been sued in connection with KPERS' investment in Home Savings: the claim against Russell had been held timely, whereas the claims against all the other defendants had been held time-barred.

To exhaust every other option for obtaining relief to ensure a consistent result on the claims against all the defendants, on April 20, 1998, KPERS filed with this Court a motion for leave to file out of time a petition for rehearing of the Court's denial of certiorari, to which it attached the petition itself. The motion and petition invoked past decisions of this Court allowing rehearing out of time in those admittedly rare instances where the timing of this Court's certiorari process has lead to opposite results among litigants involved in the very same case. *E.g.*, *Gondeck v. Pan American World Airways*, 382 U.S. 25, 27 (1962) (per curiam); *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam); *Cahill v. New York, N.H. & H.R.R. Co.*, 351 U.S. 183, 184 (1956). On May 18, 1998, the Court denied leave to file. 118 S. Ct. 1834-35.

Three days later, pursuant to Fed. R. Civ. P. 60(b)(6), KPERS moved in the district court for relief from the judgment. It invoked a line of federal appellate cases authorizing Rule 60(b) relief upon a change in controlling state law where relief is needed to eliminate a disparity in the outcome of related cases, especially where that disparity is the result of the judgment loser having been deprived of its initial choice of a state-court forum that would have permitted an authoritative resolution of the issue, so that *Erie* principles cut in favor of relief on such facts. *See* Pet. App. at 4a-5a, 9a.

Opposing the motion, respondents advanced, as an equitable consideration warranting the denial of relief, the fact that following their engineering of the removal of this case to Missouri federal court in 1992, KPERS had devoted years of energetic litigation activity, covering multiple appeals and petitions for certiorari,

advancing various grounds opposing the exercise of jurisdiction over this case by the federal courts. The district court accepted this basis for denying relief, opining that "passing familiarity" with KPERS' past litigation efforts "would convince any fair-minded person" that "KPERS long ago abandoned any persuasive claim to equity." App. 11a (citing *In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS IV*, 77 F.3d at 1066).

On appeal, respondents defended the district court's denial of Rule 60(b) relief on the theory that, by virtue of KPERS' past efforts to return the case to Kansas state court, or at least to obtain a definitive statute-of-limitations ruling by pursuing parallel litigation there, KPERS had "unclean hands" disabling it from obtaining relief. See note 10, *infra*. The Eighth Circuit did not dispute KPERS' showing that existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested. Pet. App. at 5a (listing factors and summarizing applicable precedent).[9]

Instead, the Eighth Circuit affirmed the district court on respondents' "unclean hands" theory, based on "KPERS' course of conduct during this litigation." Pet. App. 5a. One of the "equitable considerations" supporting the denial of relief, the Eighth Circuit explicitly held, was the fact that KPERS had "filed parallel state court actions" as a means of obtaining an authoritative statute-of-limitations ruling from the Kansas Supreme Court. Pet. App. 6a (citations omitted). Thus, KPERS' past efforts to head off an error on this threshold Kansas state-law issue, and hence any *need* to bring a Rule 60(b) motion, were in the end cited against it as imposing a *bar* to Rule 60(b) relief.

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[9] The Eighth Circuit's assumption that Rule 60(b)(6) is a permissible procedural vehicle for awarding such relief, depending on the particular circumstances, is in accord with this Court's decisions. *See Agostini v. Felton*, 117 S. Ct. 1997, 2018 (1997) (noting that "[i]ntervening developments in the law *by themselves* rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)") (citing J. Moore, 12 Moore's Federal Practice, § 60.48[5][b], ¶ 60-181 (3d ed. 1997)) (emphasis added). *See also Polites v. United States*, 364 U.S. 426, 433 (1960) (declining to hold that "relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law").

REASONS FOR GRANTING THE WRIT

Review is warranted in this case to correct the Eighth Circuit's fundamental misunderstanding of the "equitable" balancing required of federal courts under Fed. R. Civ. P. 60(b), and to thereby provide the lower federal courts with guidance in this area. Review is particularly needed here because KPERS is not a private litigant but an agency of the State of Kansas. In this case, the Eighth Circuit applied its theory of Rule 60(b) equitable balancing to hold that a sovereign State is to be regarded as having "unclean hands," disabling it from obtaining Rule 60(b) relief to which it would otherwise be entitled, because it earlier asserted its sovereign interest in having its own claims arising under its own law decided by its own courts. The Eighth Circuit's decision violates basic principles of federalism, conflicts with numerous decisions of this Court and of other federal circuit courts, and warrants plenary review.

1. The Eighth Circuit's decision is in conflict with decisions of this Court and the lower federal appellate courts indicating that the "equitable" balancing requirement governing Rule 60(b)(6) determinations hinges on a weighing of the general concern for finality against the specific concern for a correct outcome in the case at hand. In its first decision interpreting Rule 60(b)(6), this Court emphasized that the rule was adopted to ensure "that courts no longer are to be hemmed in by the uncertain boundaries" of prior common-law writs under which relief from a final judgment could be obtained; instead, Rule 60(b)(6) vests in them power "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). *See also id.* at 609. This Court reaffirmed this construction of Rule 60(b) in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987), while also reiterating that the rule "should only be applied in 'extraordinary circumstances.'" *Id.* at 863-64 (citing *Ackermann v. United States*, 340 U.S. 193 (1950)).

In implementing Rule 60(b)(6), the federal circuit courts of appeal have required a focus on the balancing of two basic factors:

the general interest in *finality* of judgments, and the specific interest in *justice* in achieving a correct outcome in the particular case at hand. *See, e.g.*, *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1144 (2d Cir.), *cert. denied*, 513 U.S. 1007 (1994); *First Fidelity Bank, N.A. v. Government of Antigua*, 877 F.2d 189, 196 (2d Cir. 1989); *Twelve John Does v. District of* Columbia, 841 F.2d 1133, 1138-41 (D.C. Cir. 1988); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320-22 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Nemaizer v. Baker*, 793 F.2d 58, 61-64 (2d Cir. 1986); *Great Coastal Express, Inc. v. International Bhd. of Teamsters, etc.*, 675 F.2d 1349, 1354-55 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401-02 (5th Cir. 1981).

The decision of the court of appeals below cannot be squared with this body of precedent. In affirming the district court's denial of Rule 60(b)(6) relief, the Eighth Circuit did not confine itself to a balancing of the interest in finality against the interest on these facts in an outcome under which *all* the defendants sued by KPERS are treated equally with respect to the statute-of-limitations issue. The Eighth Circuit did not dispute that the five key factors cited by KPERS bearing on the "finality versus justice" balancing would ordinarily require a grant of Rule 60(b)(6) relief. *See* Pet. App. at 5a. Instead, the Eighth Circuit elected to affirm based on respondents' "unclean hands" theory of Rule 60(b). *See id* at 5a-6a. Under this theory, KPERS must be denied Rule 60(b)(6) relief from the Eighth Circuit's erroneous statute-of-limitations ruling under Kansas law as to all but one defendant, whatever the outcome of this balancing, because KPERS deserves to be penalized for *earlier* seeking to have this litigation, or at least the statute-of-limitations issue, resolved in the Kansas state courts.[10]

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[10] For example, one set of respondents in its Eighth Circuit brief below characterized these efforts by an agency of the State of Kansas to litigate its own claims arising under its own law in its own courts, and to overcome the manipulative motion practice by respondents that had resulted in the case's removal to federal court, as "an assault upon the federal court system." Brief of Appellees Reimer & Koger Associates, Inc., et al., at 4. A particular vice of KPERS' efforts, these respondents claimed — oblivious to basic *Erie* principles

Quite apart from the obvious error underlying this holding — for a sovereign State to seek to litigate important governmental issues in its own courts can hardly make it guilty of "unclean hands," see pp. 21-23, *infra* — the Eighth Circuit has impermissibly engrafted upon Rule 60(b) an inquiry that finds no textual support and that is wholly at odds with the decisions of other circuits and of this Court.

2. Civil plaintiffs, including KPERS, are generally accorded the choice of forum. Where defendants, through manipulative motion practice (as here) or otherwise seek to shift the litigation to another forum, plaintiffs have every right to resist such efforts. Where those efforts fail, and the litigation is removed from state to federal court, civil plaintiffs who are concerned that the federal court will incorrectly decide critical issues of state law have every right to seek an authoritative state-court ruling, either by requesting certification (as here), seeking to litigate a parallel state-court lawsuit (as here), or asking the federal court to await an impeding decision by an authoritative court that will resolve the disputed issue (as here).

Civil plaintiffs such as KPERS that are stripped of their forum choice and find themselves in federal court should not be penalized on account of such efforts if they later file a Rule 60(b)(6) motion. As long as they file meritorious papers (and if they do not, they may be appropriately sanctioned under applicable sanctions rules), civil plaintiffs have a right to use available litigation options to defend their forum choice and to seek authoritative rulings on state-law issues, and they also have a right to seek relief that might later

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— was KPERS' "attempt to obtain a contrary statute of limitations ruling by the Kansas courts." *Id. See also* Brief of Appellees Estate of Frank Morgan, et al., at 8 (urging the denial of Rule 60(b)(6) relief based on the "continual flouting of federal jurisdiction by KPERS"); Brief of Appellee Blackwell Sanders Peper Martin LLP at 10-11 (arguing that relief should be "rejected out of hand" because of KPERS' "shenanigans"); Brief of Defendants-Appellees KPMG Peat Marwick LLP and Robert W.L. Spence at 20 (defending district court's view that "granting KPERS Rule 60(b)(6) relief would inappropriately reward KPERS' abusive and manipulative litigation strategies").

be warranted under Rule 60(b)(6). *Cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (observing that litigation "is an aspect of the First Amendment right to petition the Government for redress of grievances"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982) (holding that a plaintiff has a property interest in an accrued cause of action).

The Eighth Circuit's theory of Rule 60(b)(6) penalizes civil plaintiffs for asserting legitimate arguments against the exercise of federal court jurisdiction at the outset of the case, by denying them Rule 60(b)(6) relief to which they are otherwise entitled at the end of the case. This Court should not permit an interpretation of Rule 60(b)(6) that effectively forces civil plaintiffs to choose between advancing their position early in the case versus receiving relief to which they may be entitled at the end of the case. *Cf. Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (articulating in criminal litigation context a general rule against requiring the surrender of one right to advance another).

Worse, applied in a case such as this, the Eighth Circuit's approach imposes a "Catch-22" on litigants such as KPERS. To qualify for relief under Rule 60(b)(6), KPERS must show that prior to seeking such relief it worked diligently to prevent the entry of the erroneous judgment in the case. *See, e.g.*, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2864, at 359 (1995). Given its zealous efforts to return the case to the Kansas state courts, or at least obtain an authoritative statute-of-limitations ruling from the Kansas Supreme Court, it is clear that KPERS met this requirement, so as to *qualify* for Rule 60(b)(6) relief. See pp. 4-14, *supra*. But under the Eighth Circuit's theory, these very actions by KPERS to protect its own interests now perversely operate to *bar* KPERS from obtaining Rule 60(b)(6) relief, on an "unclean hands" theory that its efforts to avoid state-law error in the federal courts flouted the jurisdiction of the federal courts. See note 10, *supra*. The "Catch-22" concept, one of the more vivid literary devices of the twentieth century, has been cited in hundreds of briefs before this Court, but rarely as aptly as in this case in describing the theory of respondents and the Eighth Circuit. *Compare* JOSEPH HELLER, CATCH-22 (1955) (Scribner ed. 1996), at 55, 124.

3. Review is all the more urgently warranted in this case because KPERS is no ordinary litigant. KPERS is an agency of the State of Kansas, carrying out governmental functions of the State. KPERS' vigorous efforts to return this case to the Kansas state courts from whence it came, after the predicate for its removal was gone, were in defense of the prerogative of a sovereign State to bring its own civil claims arising under its own law in its own courts, against defendants who had earlier contracted with the State and thus were on notice that this would be the forum in which they would face the State if accused of wrongdoing in civil litigation.

It bears emphasis here that respondents were not satisfied with engineering the removal of this case to Missouri federal court by bringing meritless claims against a third-party defendant that would predictably remove the case prior to winning its dismissal from the case. See note 4, *supra*. Here, after KPERS' efforts to have the threshold statute-of-limitations issue certified to the Kansas Supreme Court were rejected, prompting KPERS to file parallel litigation in the Kansas state courts through which to set up the issue for authoritative appellate review, respondents persuaded the district court to enjoin these suits. See pp. 7-8, *supra*. The district court thereby obtained a jurisdictional monopoly over a type of litigation — civil fraud claims and other civil claims brought solely under state law and pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution — that Congress has never defined as part of the original or the removal jurisdiction of the federal courts, and that has long been protected as the exclusive province of the States.

Astonishingly, on this record the Eighth Circuit below held that the efforts of the State of Kansas, through its agency, KPERS, to overcome this federal judicial inteference with its sovereign functions amounted to "unclean hands" permitting the denial of Rule 60(b)(6) relief to which KPERS would otherwise be entitled. This cannot be the law. It cannot constitute "unclean hands" for a sovereign State to advance its interest in seeing disputes to which it is a party resolved in its own courts. For example, when the federal constitutional rights of a State's litigation opponents are at stake in criminal litigation or other litigation of importance to the

State, the State is entitled to insist that its opponents litigate their federal constitutional claims in state court. *E.g., Younger v. Harris*, 401 U.S. 37 (1971); *Trainor v. Hernandez*, 431 U.S. 434, 444-47 (1977). Thus, had the State of Kansas, in the aftermath of its $65 million loss on its Home Savings investment, brought a criminal prosecution against some of the respondents for fraud, rather than limiting itself to a civil suit, respondents could not have enjoined those proceedings.

This Court has likewise accorded States broad latitude to insist on conducting *civil* litigation in its own courts as opposed to federal court, even when it is a *defendant* being sued for damages by a private party under federal law. In such circumstances, a State may of course invoke the Eleventh Amendment as a bar to being sued in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). And as this Court held last Term, a State also enjoys the prerogative of claiming sovereign immunity against suit in its own courts. *Alden v. Maine*, 119 S. Ct. 2240 (1999). *See also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999).

The Eighth Circuit's decision below, holding that the State of Kansas had "unclean hands" on account of having sought to litigate its own state-law claims in its own courts, flies in the face of the principles of federalism recognized in these decisions. Had respondents been the ones suing KPERS, for money damages allegedly owed under a federal statute in conjunction with KPERS' governmental functions, KPERS would have had the prerogative to deny respondents *any* forum in which to litigate those federal statutory claims. Here, KPERS sought only to litigate its own Kansas law claims against respondents in the forum of its choice, in which respondents would have had a full and fair opportunity to defend. For the State of Kansas to thereby seek to advance its sovereign interests in its own courts is not something that should later be used against the State to deprive it of relief to which it would otherwise be entitled under Rule 60(b)(6), or under any other rule.

In its decision below, the Eighth Circuit employed an unprecedented approach to Rule 60(b)(6) to penalize an agency of the State of Kansas, acting in its governmental capacity, for pursuing its sovereign interest in adjudicating its own claims arising under its own law in its own courts, or at least to have the threshold statute-of-limitations issue resolved authoritatively in the Kansas Supreme Court. It denied KPERS relief to which it would otherwise be entitled, leaving in place a dismissal of KPERS' claims against some of the defendants in this case, while its claims against a final defendant go forward.

The explicit basis of the Eighth Circuit's ruling is that the State of Kansas has "unclean hands" on account of its zealous defense, throughout this litigation, of its sovereign interests. Adopting the view that KPERS' federalism arguments against the jurisdictional monopoly seized by the federal courts below were "objectively unreasonable" and made "in bad faith," the Eighth Circuit has evidently joined the camp of those who believe that "[a]rguments about federalism values" are "little more than the last refuge of a scoundrel." DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 7 & n.25 (1995). The Eighth Circuit's decision is an affront to fundamental principles of federalism and should not be left in place.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT F. COLEMAN
KENNETH PHILIP ROSS
EUGENE J. SCHILTZ
SEAN B. CROTTY
ROBERT F. COLEMAN & ASSOCS.
5310 Three First Nat'l Plaza
Chicago, IL 60602
(312) 444-1000

KENNETH CHESEBRO*
1600 Massachusetts Avenue
Cambridge, MA 02138
(617) 661-4423

EUGENE I. PAVALON
GEOFFREY L. GIFFORD
PAVALON, GIFFORD,
LAATSCH & MARINO
Two North LaSalle St., Suite 1600
Chicago, IL 60602
(312) 419-7400

Counsel for Petitioner

* Counsel of Record

January 3, 2000

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 98-3528

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff—Appellant,

v.

REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; RONALD REIMER, an individual; KENNETH H. KOGER, an individual; CLIFFORD W. SHINSKI, an individual; BRENT MESSICK, an individual; ROBERT CREW, an individual; SHERMAN DREISESZUN, an individual; I.I. OZAR, an individual; FRANK SEBREE, and individual; MICHAEL K. RUSSELL, an individual; GAGE & TUCKER, a law partnership; PEAT, MARWICK, MITCHELL & CO., an accountancy firm; KPMG PEAT MARWICK, an accountancy firm; ROBERT SPENCE, an individual; THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN; MARILYN J., co-executor of the estate of FRANK S. MORGAN,
Defendants-Appellees,

C. PATRICK McLARNEY, substituted for SHOOK, HARDY & BACON,
Intervenor-Defendant-Appellee.

BLACKWELL, SANDERS, PEPER, MARTIN, L.L.P.; WILLIAM H. SANDERS, SR., individually and as the representative of a defendant class,
Intervenor-Defendants—Appellees.

October 5, 1999

Before McMILLIAN, BOWMAN, and JOHN R. GIBSON, Circuit Judges.

Kansas Public Employees Retirement System appeals the district court's[1] denial of its motion for relief from final judgment under Fed. R. Civ. P. 60(b). In the underlying case, summary judgment was entered against KPERS in favor of all the defendants in this case (except Michael Russell) on the ground that KPERS's claims were barred by the applicable Kansas statutes of limitations. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 114 F.3d 679 (8th Cir. 1997)(*KPERS VI*), *cert. denied*, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998), leave to file for *rehearing denied*, 140 L. Ed. 2d 968, 118 S. Ct. 1834 (1998). Shortly after our decision in *KPERS VI* affirming the summary judgment, the Kansas Supreme Court decided *KPERS v. Reimer & Koger Assoc., Inc.*, 941 P.2d 1321, 1343 (Kan. 1997), disapproving of our interpretations of Kansas law that led to the summary judgment against KPERS. KPERS received the benefit of this change in state law in *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*), which held that Michael Russell was not entitled to summary judgment under the statute of limitations defense. KPERS moved to reopen the case under Rule 60(b) in light of the change in Kansas law. The district court denied KPERS's motion and we affirm.

KPERS initially filed this action in state court in Kansas against its investment advisors to recoup KPERS's investment of some $65 million in debentures of Home Savings Association, a thrift that failed. When KPERS joined as defendants certain former directors of Home Savings, the directors impleaded the Resolution Trust Corporation, receiver of Home Savings. Acting under 12 U.S.C. § 1441a(*l*)(3), the RTC removed the case to the Western District of Missouri, which resulted in the application of Missouri, rather than Kansas, limitations law. *KPERS v. Reimer & Koger, Inc.*, 61 F.3d 608, 614 (8th Cir. 1995) (*KPERS III*), *cert. denied*, 516 U.S. 1114 (1996). Under Missouri's borrowing statute, the

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[1] The Honorable D. Brook Bartlett, Chief Judge for the United States District Court for the Western District of Missouri.

Kansas statute of limitations would apply if it were shorter than the five-year Missouri statute. Id. We concluded that under Kansas law the Kansas ten-year statute for actions by KPERS would not apply retroactively to revive a barred claim. *Id.* at 615. In *KPERS VI* we rejected the argument that KPERS's investment activities were a governmental function so that claims based on those activities were not subject to a statute of limitations, and we decided that the Kansas two-and three-year statutes of limitations barred KPERS's claims. 114 F.3d at 687-88.

While *KPERS VI* was under submission, the Kansas courts were entertaining an appeal by KPERS in another case, concerning which, if any, Kansas statute of limitations applied to claims arising out of KPERS's investments. KPERS asked this Court to certify the statute of limitations question to the Kansas Supreme Court, *see KPERS VI*, 114 F.3d at 688 n.11, but we declined to do so and we issued our *KPERS VI* opinion on May 13, 1997. We denied rehearing on June 12, 1997, and our mandate issued on June 20, 1997.

A week after our mandate issued, on June 27, 1997, the Kansas Supreme Court decided its KPERS case, holding that, contrary to our rulings, KPERS's investment activities were governmental in nature, and therefore no statute of limitations applied to them until the Kansas ten-year statute was enacted. 941 P.2d at 1343.

On July 17, 1997, KPERS filed a motion in this Court for leave to file a second rehearing petition in *KPERS VI* or, in the alternative, for us to recall our mandate in light of the Kansas decision. We denied the motion. On September 10, 1997, KPERS filed a petition for a writ of certiorari, arguing that the case should be remanded in light of the Kansas decision. The Supreme Court denied certiorari on January 12, 1998. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998).

In the meantime, the one remaining defendant in this case, Michael Russell, who was unrepresented by counsel, obtained summary judgment in the district court on the ground that KPERS's claim was time-barred. KPERS appealed that judgment, and we decided the appeal after the Kansas decision. Russell filed

no brief in the appeal. Because we were obliged to follow Kansas law on the statute of limitations issue, we reversed the judgment in favor of Russell in light of the new Kansas decision. *KPERS VII*, 140 F.3d at 751. We held that under the new decision the Kansas ten-year statute was the only statute of limitation applicable to KPERS's claim, and that the claim was therefore timely filed. *Id.* at 752.

Our decision in *KPERS VII* was filed on March 30, 1998. On May 21, 1998, KPERS filed the Rule 60(b) motion for relief from judgment at issue in this appeal. The district court denied the motion on two independent grounds: first, that KPERS had already presented the change in law argument to this Court on its motion for leave to file a second rehearing petition or to recall mandate, and we had denied the motion; and second, that KPERS had not presented exceptional circumstances warranting Rule 60(b)(6) relief.

We review the district court's Rule 60(b) rulings only for abuse of discretion. *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979). Rule 60(b)(6) authorizes relief from final judgments in extraordinary circumstances. *Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997). Generally, a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance. *See, e.g.*, *Carter*, 593 F.2d at 824; *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221, 134 L. Ed. 2d 951, 116 S. Ct. 1851 (1996); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-74 (2d Cir.), *cert. denied*, 513 U.S. 1001, 130 L. Ed. 2d 419, 115 S. Ct. 512 (1994); *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve. "[The common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims." *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir.), *cert. denied*, 522 U.S. 952, 118 S. Ct. 373, 139 L. Ed. 2d

290 (1997). Moreover, there is nothing in the Erie[2] doctrine that requires federal courts to sacrifice the finality of their judgments because state courts subsequently interpret state law differently than the federal courts have done. *DeWeerth*, 38 F.3d at 1272-74; *Batts*, 66 F.3d at 749-50; *Cincinnati Ins. Co.*, 131 F.3d at 628-29. Therefore, even though the law has changed since judgment was entered against KPERS, KPERS must show some extraordinary circumstance in order to justify Rule 60(b) relief.

KPERS argues that several factors make this an extraordinary case. First, after *KPERS VII*, different rules of law will govern the same issue in the same case involving the same factual setting. *See Pierce v. Cook & Co.*, 518 F.2d 720, 723 (10th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1079, 47 L. Ed. 2d 89, 96 S. Ct. 866 (1976); *McGeshick v. Choucair*, 72 F.3d 62, 64-65 (7th Cir. 1995), *cert. denied*, 517 U.S. 1212, 134 L. Ed. 2d 937, 116 S. Ct. 1834 (1996). Second, KPERS did not choose to litigate in federal court with the attendant possibility of a misinterpretation of state law, but landed in federal court as a result of removal by a third party defendant. *See Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (recalling mandate of Court of Appeals). Third, before judgment was entered in this case, KPERS alerted the federal courts to the pendency of the issue in the Kansas courts and asked for certification of the question. *See Sargent*, 75 F.3d at 90. Fourth and fifth, the disposition of KPERS's case was not on the merits, and KPERS contends that the defendants would suffer no unfair prejudice from reopening the case. *See MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755-56 (8th Cir. 1996).

While these factors have been considered relevant in other cases, they do not compel the conclusion that the district court abused its discretion in denying KPERS's motion. The district court alluded to KPERS's course of conduct during this litigation, stating: "Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the

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[2] *Erie RR. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

Eighth Circuit Court of Appeals — this case is over." Early in this case, KPERS obtained an ex parte severance from the Kansas state court in order to frustrate removal. *KPERS v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994). KPERS later filed parallel state court actions which were meant to subvert federal removal jurisdiction, *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996) (*KPERS IV*), *cert. denied*, 519 U.S. 948, 136 L. Ed. 2d 250, 117 S. Ct. 359 (1996). The district court held the filing of those cases to be objectively unreasonable and done in bad faith, and we affirmed. *See KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 629 (8th Cir. 1999) (*KPERS VIII*) (affirming award of attorney fees against KPERS for unreasonably and vexatiously multiplying proceedings). The district court may properly give weight to equitable considerations in exercising its discretion under Rule 60(b). *MIF Realty*, 92 F.3d at 755-56. Here, the district court did so and declined to reopen this case. We see no abuse of discretion in the district court's ruling.[3]

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[3] The discretion vested in the district court in ruling on Rule 60(b) motions distinguishes this case from *Brenna v. Fed'l Cartridge Co.*, 183 F.2d 414 (8th Cir. 1950) (per curiam), in which this Court granted rehearing of one of its own decisions based on a change in the law.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,	)	No. 92-0922-CV-W-9
Plaintiff,	)	No. 92-0819-CV-W-9
v.	)	
MICHAEL RUSSELL,	)	Filed Aug. 19, 1998
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6), FEDERAL RULES OF CIVIL PROCEDURE

I.
BACKGROUND

On June 3 and July 25, 1996, I entered orders granting summary judgment in favor of all defendants, except Michael Russell, in this case. KPERS appealed.

Defendant Russell, representing himself, subsequently moved for summary judgment. On March 4, 1997, I entered an order granting Russell's motion. KPERS appealed the March 4, 1997, order. Russell did not participate in the appeal and did not file a brief in the Eighth Circuit Court of Appeals supporting his position.

On May 13, 1997, the Eighth Circuit Court of Appeals affirmed the June 3, and July 25, 1996, orders granting summary judgment to all defendants except Russell. *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F. 3d

679 (8th Cir. 1998) (*KPERS VI*). The Eighth Circuit Court of Appeals denied KPERS' motions for rehearing and rehearing en banc on June 12, 1997. The Eighth Circuit Court of Appeals issued its mandate on June 20, 1997.

On June 27, 1997, the Kansas Supreme Court entered an order interpreting Kansas law applicable to KPERS. *KPERS v. Reimer & Koger Assoc., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997). Specifically, the Kansas Supreme Court disagreed with the Eighth Circuit Court of Appeals' prior rulings and held that claims by KPERS are not governed by the general two and three year statute of limitations. *Id.*

KPERS did not file any motion in this court seeking relief based on the Kansas Supreme Court's June 27, 1997, decision.

On or about July 17, 1997, in *KPERS VI*, KPERS filed with the Eighth Circuit Court of Appeals a Motion for Leave to File Instanter a Second Petition for Rehearing Out of Time or, Alternatively, to Recall Mandate for the purpose of Conforming Decision to Recent Controlling Decision of State Law. KPERS argued that the decision of the Kansas Supreme Court should control the statute of limitations issues in *KPERS VI*. On January 12, 1998, the United States Supreme Court denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, ___ U.S. ___, 118 S. Ct. 738 (1998).

KPERS' appeal of my order granting summary judgment to Russell was pending at the time of the Kansas Supreme Court's June 27, 1997, order. On March 30, 1998, the Eighth Circuit Court of Appeals reversed the March 4, 1997, order granting summary judgment to defendant Russell on the ground that there had been an intervening change in state law. *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) (*KPERS VII*).

The Eighth Circuit Court of Appeals in *KPERS VII* declined to follow the holding in KPERS VI because the Kansas Supreme Court's decision was handed down after *KPERS VI* but before the decision in *KPERS VII*. *Id.* at 751. The Eighth Circuit Court of Appeals stated that "*KPERS VI* became final" when the United States Supreme Court denied certiorari on January 12, 1998. *Id.*

On April 20, 1998, KPERS filed with the United States Supreme Court a Motion for Leave to file Petition for Rehearing Out of Time, and Petition for Rehearing. Based on the Eighth Circuit Court of Appeals' *KPERS VII* decision, KPERS asked the Supreme Court to vacate the January 12, 1998, denial of certiorari in *KPERS VI*. KPERS presented the same arguments to the Supreme Court that are presently before this Court. On May 18, 1998, the Supreme Court denied KPERS' motion.

On May 21, 1998, KPERS filed in this court a Rule 60 (b) (6) Motion for Relief from Judgment. Based on the Eighth Circuit Court of Appeals' decision in *KPERS VII*, KPERS seeks relief from the 1996 orders involved in *KPERS VI* granting summary judgment to all defendants except Russell. *See* Reply Memorandum, pp. 6-7 ("it is not the Kansas Supreme Court's ruling alone that warrants Rule 60(b) relief in this case, it is the 8th Circuit's ruling in *KPERS VII*").

II.
DISCUSSION

A. Rule 60 (b) Does Not Authorize this Court to Review Appellate Court Decisions Rejecting the Basis of KPERS' Argument for Rule 60 (b) Relief

Rule 60 (b) does not give a court the power to revisit an issue already decided by an appellate court. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992) ("district court must comply strictly with the mandate rendered by the reviewing court.").

KPERS argues that it is not asking for relief based on the Kansas Supreme Court decision but on the reasoning of the Eighth Circuit Court of Appeals in *KPERS VII*. However, KPERS wraps the package, the foundation of KPERS' argument here, and in KPERS VII and in its July 17, 1997, Motion for Leave to File a Second Petition for Rehearing in *KPERS VI*, is that the decision of the Kansas Supreme Court, not the decision of the Eighth Circuit

Court of Appeals, establishes the applicable statute of limitations. When presented with KPERS' argument, the Eighth Circuit Court of Appeals refused to grant a rehearing or to recall its mandate in KPERS VI. Thereafter, when presented with the same argument, the United States Supreme Court denied certiorari.

Under these circumstances, Rule 60(b) does not authorize this court to grant relief from the final judgment in *KPERS VI.*

B. KPERS is Not Entitled to Relief Under Rule 60(b)

Even if one accepts KPERS' argument that it has already presented to appellate courts the argument made here, KPERS is not entitled to relief under Rule 60 (b). The reasoning of the Eighth Circuit Court of Appeals in *KPERS VII* cannot possibly produce the same result in *KPERS VI* because the procedural facts in *KPERS VI* are crucially different from the procedural facts in KPERS VI are crucially different from the procedural facts in *KPERS VII. KPERS VI* was finally decided by the Eighth Circuit Court of Appeals *before* the Kansas Supreme Court decision. The crucial factual difference that led the Eighth Circuit Court of Appeals to reach a result in *KPERS VII* that was different from the result in *KPERS VI* was that the Eighth Circuit Court of Appeals decided *KPERS VII* after the Kansas Supreme Court decision was issued. Therefore, applying the reasoning of KPERS VII to the facts in *KPERS VI* would produce a different result in *KPERS VI* than was reached in *KPERS VII.*

Furthermore, Rule 60 (b) provides the relief "only where the movant has shown exceptional circumstances." *Hepper v. Adams County*, 133 F.3d 1094, 1096 (8th Cir. 1998). For the reasons state in ¶ 4-9 of defendant KMPG Peat Marwick and Robert W. L. Spence's Memorandum of Law, a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment. Therefore, plaintiff has not satisfied its burden under Rule 60 (b) (6).

III.
CONCLUSION

Only passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals — this case is over. To the extent, if at all that equitable considerations have an effect on Rule 60 (b) relief, KPERS long ago abandoned any persuasive claim to equity. *See In re KPERS*, 85 F.3d 1353, 1359-60 (8th Cir. 1996); *KPERS v. Reimer & Koger Assoc. Inc.*, 77 F. 3d 1063, 1066 (8th Cir.), *cert. denied*, 117 S. Ct. 345 (1994).

Because this court is without power to grant relief when higher courts have refused to grant relief when presented with the very reasons advanced here and because plaintiff has not demonstrated exceptional circumstances justifying extraordinary relief, KPERS' Rule 60 (b) (6) Motion for Relief from Judgment is denied.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

August 19, 1998